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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-185

BOSTON FIREFIGHTERS UNION, LOCAL 718, *Petitioner*,

v.

BOSTON CHAPTER, NAACP, *et al.*, *Respondents*,

No. 82-246

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC., *Petitioner*,

v.

PEDRO CASTRO, *et al.*, *Respondents*,

No. 82-259

NANCY B. BEECHER, *et al.*, *Petitioners*,

v.

BOSTON CHAPTER, NAACP, *et al.*, *Respondents*.

On Writs Of *Certiorari* To The United States Court Of Appeals For The First Circuit

Brief Of The National Bar Association, Inc. And The National Association For Equal Opportunity In Higher Education

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QUESTION PRESENTED

This *amicus* brief will address the following question:

Whether the district court exceeded its authority in amending a consent decree in an employment discrimination case requiring that layoffs of city employees be made not on the basis of a pre-existing system of seniority mandated by a state statute, but rather on a court ordered modified seniority system designed to assure the integrity of the court's earlier order.

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Amici Curiae

CONSENT OF THE PARTIES

Petitioner and respondents have consented to the filing of this brief and their letters of consent will be filed with the Clerk of the Court.

INTEREST OF THE *AMICI CURIAE*

The *National Bar Association* (NBA) is a professional member organization of predominantly black lawyers. Founded in 1925, the NBA has been concerned about racial discrimination and its past effects on the black citizenry of this country. To this end, the NBA has appeared before this Court on numerous occasions to express its views and to provide jurisprudential guidance so as to make the slave progeny other than a limited partner in the labor/economic mainstream of America.

In the past, the NBA has appeared before this Court to express its views on subjects of interest to Black America and to offer diverse jurisprudential insights for the maintenance of domestic tranquility. The NBA is before this Court again for the same reasons.

The NBA maintains its National Headquarters at 1773 T Street, N.W., Washington, D.C. 20009. Its National President is Warren Hope Dawson, Tampa, Florida.

The *National Association For Equal Opportunity in Higher Education* (NAFEO), 2243 Wisconsin Avenue, N.W., Washington, D.C. 20007, founded in 1969, is a non-profit voluntary, independent association of 114 historically and predominantly black colleges and universities enrolling some 200,000 students.

The historically and predominantly black institutions of higher education whose views are presented in this *amicis* brief, have backgrounds of perpetual service to all people, with missions and goals to make educational opportunities a reality rather than an empty expectation.

This Association has a unique interest in this litigation. This brief is respectfully submitted to present the position of NAFEO consistent with its history and purpose which NAFEO feels may not adequately be presented by the parties in this appeal.

Employment discrimination lawsuits concern not only the individuals involved. Such suits vindicate the public interest in

a labor market free of unlawful discrimination. This interest, already great in the case of a private employer, looms even larger when the employer to be sanitized of discriminatory practices, and the effect of such practices, is a public one like the city of Boston. *Amici* are here in what they conceive to be the public interest.

STATEMENT OF THE CASE

The judgment of the court of appeals was entered in two consolidated employment discrimination cases, originally filed in the early 1970's, one of which involved the Boston Police Department and the other the Boston Fire Department. The cases successfully challenged the manner in which applicants for public safety jobs were chosen. The relief granted in those cases affected the hiring procedure for police and firefighters in municipalities throughout Massachusetts. The court of appeals judgment being reviewed here affirmed a district court modification of the remedy in the discrimination cases; the modification addressed layoffs in the Boston police and fire departments.

The Police Case

Six blacks and two hispanics who wanted to join the Boston Police Department, but who had failed the Massachusetts Civil Service Police Entrance Examination, filed a lawsuit in 1970 against the Civil Service Commission and the Boston Commissioner of Police, challenging the validity of the test and other aspects of the process by which police officers were recruited and hired. *Castro* v. *Beecher*, 334 F. Supp. 930 (D. Mass. 1971). The plaintiffs claimed that the alleged discriminatory acts violated the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983.

After a bench trial, the district court found that the Civil Service Commission had administered a "general intelligence type of test" consisting of one hundred multiple-choice questions which tested such skills as reading comprehension, analo-

gical reasoning and numerical sequencing. *Castro, supra*, at 941-42. The court held that the tests were "not rationally or empirically significantly related to the capacity of applicants to be trained for or to perform a policeman's job," *id.* at 942, and noted with some acerbity that "[t]he categories of questions sound as though they were drawn from *Alice in Wonderland*." *Id.*

Results of the September, 1970 test, the only one for which results were compiled according to race, showed that 25% of the black applicants passed, 10% of hispanics passed, and 65% of all other applicants passed. The court held that the test "gave a discriminatory advantage to white persons . . . [and thus] deprived plaintiffs of the equal protection of the laws guaranteed by the Fourteenth Amendment and created liability under 42 U.S.C. §§ 1981 and 1983." *Id.* at 944.[1]

The district court also found a great disparity between the percentage of minorities on the police force and the percentage of blacks living in Boston. Between 1960 and 1970, the percentage of blacks in Boston increased from 9 to 16.3%, the court found, while the percentage of blacks and hispanics on the police force increased from 2 to 3.6% during that period. *Id.* at 935. (The 3.6% statistic was later determined to be mistakenly high. On appeal, the parties stipulated that minorities comprised 2.3% of the police department in 1970). *Castro* v. *Beecher*, 459 F.2d 725, 728 n.1 (1st Cir. 1972)). The court of appeals determined the combined black and hispanic population to be 23% of the city's total.

Despite finding an invalid test with a discriminatory impact, the district court refused to grant the requested class-based

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[1] The court also found that the test violated a state statute, Mass. Gen. Laws Ann. ch. 31, § 10, providing in pertinent part that police entrance examinations had to "relate to matters which will fairly test the fitness of the applicants actually to perform the duties of the positions for which they apply." *Castro* v. *Beecher*, *supra*, at 937.

relief, which would have provided for priority hiring of blacks and hispanics. The court held that these minorities were not the only groups injured by the test, but that it had a negative impact on all applicants who "did not share the prevailing white culture . . . ." *Castro* v. *Beecher*, *supra*, at 943. The court limited its relief to enjoining further use of the invalid test and ordering the creation of new, job-related tests. *Id.* at 945.

On appeal, the First Circuit upheld the district court's finding that the test was discriminatory, but held that the limited injunctive relief granted should be supplemented by affirmative, class-based relief structured to bring about an immediate increase in the number of blacks and hispanics actually employed as police officers. *Castro* v. *Beecher*, *supra*, at 731-32. On remand, a consent decree was entered into among the parties, the chief feature of which was a hiring plan providing that minorities and non-minorities would be hired on a one-to-one basis. *Castro* v. *Beecher*, 365 F. Supp. 655 (D. Mass. 1973).

After the decree was entered, twenty-seven towns and cities obtained a state court order requiring them to honor existing state laws granting preferences to veterans and residents in hiring police and firefighters. This would have nullified the effect of the consent decree. However, in 1974, the Supreme Judicial Court of Massachusetts ruled that statutory preferences were to observed *within* each of the groups created by the consent decree. *Director of Civil Service* v. *Town of Milton*, 366 Mass. 498, 320 N.E.2d 883 (1974).[2]

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[2] The state judiciary entered the case when Massachusetts municipalities brought a bill in equity to compel the Civil Service Commission to comply with the hiring preference accorded residents of the hiring municipality. Mass. Gen. Laws Ann. c. 31, § 58 (West 1979). (The Civil Service law was recodified on Jan. 1, 1979). The residents' preference was formerly at section 48A. The Superior Court of Suffolk County found the statute to be constitutional and required compliance therewith. *Town of Milton* v. *Civil Service Commission*, 365 Mass. 368, 312 N.E.2d 188 (1974). The Supreme Judicial Court affirmed on the grounds that the statute did not violate either the

A new consent decree was entered into on July 7, 1975, which divided applicants into four groups: Group A, consisting of minorities who failed any of the invalid tests given in 1972; Group B, consisting of persons, most of whom presumably would be white, who passed one of the invalid tests but had not been certified for permanent posts; Group C, comprised of blacks and hispanics who never took one of the old, illegal tests, but who took and passed the 1972 test; and Group D, comprised

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"right to travel" inherent in the federal constitution's guarantee of liberty, or the equal protection clause. The court noted that the Civil Service Commission argued that the residents' preference might be inconsistent with the consent decree entered in *Castro* v. *Beecher*, 365 F. Supp. 655 (D. Mass. 1973), but would "express no opinion on the question whether such a conflict exists or what the proper result would be if it does." 365 Mass. at ____, 312 N.E.2d at 196. However, it is of interest that the Civil Service Commission contended that "*if the procedures required by [the residents' preference statute] conflict with the priority system set up in the decree the operation of the statute must yield.*" *Id.* (emphasis supplied).

The state superior court, on remand in the *Milton* case, entered an order requiring towns and cities to appoint police and firefighters in the following order, without respect to the federal consent decree establishing racial preferences: "(1) disabled veterans who are residents, (2) veterans who are residents, (3) residents, (4) disabled veterans who are nonresidents, (5) veterans who are nonresidents (6) nonresidents." *Director of Civil Service* v. *Town of Milton*, 366 Mass. 498, 320 N.E.2d 883, 885 (1974) (*Milton II*). The Supreme Judicial Court, called upon to resolve the conflicting state and federal decrees, ordered that the state preference be applied within each of the groups created by the federal decree. 366 Mass. at ____, 320 N.E.2d at 887-89. The final draft of the consent decrees entered in the police and fire cases in 1975 reflected the Supreme Judicial Court's holding. As it had in the first *Milton* case, the Civil Service Commission in *Milton II* contended that "the supremacy clause of the United States permits the suspension of valid state laws and judgments where their operation might conflict with the effectuation of a Federal judgment designed to remedy constitutional violations." 366 Mass. at ____, 320 N.E.2d at 886. That is of course *Amici's* point.

of all others who passed the 1972 test. *Castro* v. *Beecher*, 386 F. Supp. 1281, 1286 (D. Mass. 1975). In Boston and Springfield, cities with relatively high minority populations, one minority applicant was to be hired for each non-minority applicant; in other municipalities, one minority was to be appointed for every three non-minority appointees. Within racial groups, among minorities, Group A applicants were hired before those in Group C; and among whites, Group B applicants were to be appointed before those in Group D. Veterans and residency preferences were maintained within each of the four groups. The remedial measures were to remain in force until the percentage of minorities on local police and fire forces approximated the proportion of minorities in the communities served.

The Fire Case

The first fire case, a class action, was brought in 1972 against the Civil Service Commission by the Boston Chapter of the NAACP and named plaintiffs. Plaintiffs alleged violations of the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983 in connection with the recruitment and hiring of firefighters in Massachusetts. The second fire case was brought in 1973 against the city of Boston by the U.S. Attorney General pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. The cases were consolidated. *See Boston Chapter, NAACP, Inc.* v. *Beecher*, 371 F. Supp. 507 (D. Mass. 1974).

The Civil Service firefighters' examination, which plaintiffs claimed was discriminatory, consisted of "25 questions of a general intelligence nature," and 75 questions from an instructional manual, known familiarly as the "Red Book." *Id.* at 511. The district court held that the defendants failed to show the test was job-related. The court found that the test had a discriminatory impact on minorities. *Id.* at 514. Ruling that the plaintiffs had established an unrebutted case of race dis-

crimination, the court ordered affirmative hiring relief like that granted in the police case.[3] *Id.* at 521-23.

On appeal, the First Circuit affirmed the district court's finding of discrimination and the relief granted. *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

In 1978, new consent decrees were entered into in the police and fire case, retaining the same relief.

Results of the Consent Decrees

As of July 13, 1976, eighty-one Massachusetts municipalities had integrated their police and fire forces to a level within 1% of the minority populations of the communities they served, and had been released from further judicial monitoring. *See Castro* v. *Beecher*, 522 F. Supp. 873, 875-76 (D. Mass. 1981) (in which the district court reviewed generally progress made under the consent decrees while modifying the decrees in the manner challenged here). Boston and other municipalities lagged in achieving proportional representation, yet made considerable progress. By July, 1981, the Boston Police Department was 11.7% black and hispanic: 224 officers out of 1912 were minority. The Boston Fire Department's minority representation stood at 14.7%, or 248 black and hispanic officers of a total of 1690, in contrast to 1970, when 0.9% of the firefighters were minority. *Id.* at 876. The city's minority population had increased during this period to 30%. *Id.*

These were the highest minority percentages reached. At this point, the affirmative action program was affected by

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[3] The relief in the fire case actually served as the model for the consent decree in the police case. The fire case, though begun after the police case, was resolved more quickly. Affirmative hiring relief was granted by the trial court in the fire case; in the protracted police case, the court of appeals ordered affirmative hiring and suggested its form, but the relief was finalized only on remand.

another development. Boston and other towns and cities had to confront restrictions on public spending imposed by a voter-initiated tax ceiling commonly known as "Proposition 2½." Boston targeted its police and fire departments as two areas of retrenchment and planned a series of layoffs. In carrying out the layoffs, it complied with a state statute requiring that employees be let go in reverse order of seniority: last hired, first fired, with the exception that veterans could keep their jobs while more senior police officers and firefighters were dismissed. Mass. Gen. Laws Ann. ch. 30, § 9A; ch., 31, §§ 26, 39 (West 1979).

By the end of July, 1981, some 162 police officers, including 64 minority officers, had been laid off, reducing the number of minority officers from 224 to 150 and the percentage from 11.7 to 8.6. In the fire department, 155 firefighters, including 68 blacks and hispanics, were laid off, reducing their numbers from 248 to 180 and the percentage from 14.7 to 11.7. In addition to layoffs actually carried out, further reductions in force planned and scheduled for completion by August 12, 1981, would have lowered the minority representation on the police force to 6.2%, and that on the fire force to 9.1%. *Castro* v. *Beecher*, *supra*, at 876.

Before the planned layoffs could be given effect, the plaintiffs in both cases petitioned the district court to modify the consent decree in a manner that would forbid layoffs in numbers that would disproportionately affect minorities. They asked that the peak percentages reached before the layoffs began be preserved.

In August, 1981, the district court held that the waves of layoffs conducted pursuant to Proposition 2½ should be treated as unforeseen circumstances not contemplated when the consent decrees were entered into, and which having arisen, warranted modification of the prescribed remedy. *Id.* at 877. Strict application of the statutory provision requiring layoffs in reverse order of seniority would produce "a grievous wrong . . . i.e., a refusal to amend the remedial order would

allow the substantial eradication of all progress made by blacks and hispanics in securing public employment as members of either the police or fire departments since 1970." *Id.* at 877. The court modified the consent decrees to preserve the minority percentages reached in July, 1981, and ordered that veterans preferences be applied within separate minority and non-minority seniority lists. The modification was appealed to the First Circuit by the police and firefighters unions, which had intervened as interested parties, and by the Civil Service Commission. The court of appeals affirmed. *Boston Chapter, NAACP, Inc.* v. *Beecher*, 679 F.2d 965 (1st Cir. 1982).

The court of appeals decided first that the district court was empowered to modify the decree; and second, that it had done so appropriately in this instance. Petitioners then sought and were granted *certiorari*.[4]

ARGUMENT

I. THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN MODIFYING ITS ORIGINAL CONSENT DECREE IN ORDER TO PRESERVE THE INTEGRITY OF THAT DECREE

As the facts indicate, this action which was initiated as three separate cases against the police and fire department was initially commenced by unsuccessful black and hispanic candidates for appointment as Boston Police Officers and Firemen.

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[4] In June 1982, the month after the First Circuit's decision, Massachusetts enacted legislation requiring Boston to rehire all police officers and firefighters terminated since July 1, 1981, and providing funds to enable the city to carry out this mandate. The legislation also provides that the Boston employees let go during 1981 layoffs cannot be laid off again for fiscal reasons. 1982 Mass. Acts., ch. 190, § 25. However, this development does not moot the current matter, inasmuch as the legislation reached only those individuals who lost their jobs during 1981, while the consent decree as modified remains in force for an indeterminate period.

Plaintiffs claimed racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983, with the government subsequently raising Title VII claims.

Between the entering of the consent decree and the subsequent petition for modification this court decided *Washington* v. *Davis*, 426 U.S. 229 (1976) and *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). These cases established that a violation of equal protection may not be sustained in an action brought pursuant to 42 U.S.C. § 1983 by a mere showing of disparate impact of governmental action; an intent to discriminate must also be shown.

The petitioners argue that the consent decree was erroneous in light of this Court's intervening rulings in *Washington* v. *Davis*, *supra*, and *Arlington Heights*, *supra*. This argument miscomprehends the nature of the consent decree and the scope of inquiry presented by a petition to modify.

In both *Washington* v. *Davis*, *supra*, and *Arlington Heights*, *supra*, this Court's concern was with the requisite proof necessary to establish entitlement to relief based on a judicial finding of racial discrimination under 42 U.S.C. § 1981. At bar, the relief sought is not contingent upon proof of racial discrimination. When the consent decree was entered "all issues of proof were dispensed with." *See Sarabia* v. *Toledo*, 601 F.2d 914 (6th Cir. 1979) (on similar facts the Sixth Circuit ruled that the district court did not violate *Washington* v. *Davis* or *Arlington Heights* by entering a subsequent order to effectuate goal of consent decree); *Bolden* v. *Pennsylvania State Police*, 73 F.R.D. 370 (E.D. Pa. 1976). Here the relief sought is modification of the consent decree to prevent the erosion of its intended judicial purpose, i.e., to eradicate the vestiges of past discrimination.

Necessarily, consent decrees are two-sided coins. On one side, it is essentially a contract negotiated by parties. On the other side, it is a court order which is subject to change if circumstances warrant. *United States* v. *ITT Continental*

Baking Co., 420 U.S. 223, 236 (1975); *United States* v. *Armour & Co.*, 402 U.S. 673 (1971); *United States* v. *Motor Vehicles Manufacturers Ass'n of United States*, 643 F.2d 644, 648 (9th Cir. 1981); *N.Y.S. Ass'n for Retarded Children* v. *Carey*, 596 F.2d 27 (2d Cir. 1979); *Brown* v. *Neeb*, 644 F.2d 551, 557 (6th Cir. 1981). Importantly however, "since consent decrees and orders have many attributes of ordinary contracts, they should be construed basically as contracts." *United States* v. *ITT Continental Baking Co.*, *supra*, at 238; *Strouse* v. *J. Kinson Cook, Inc.*, 643 F.2d 883, 885 (6th Cir. 1981); *Brown* v. *Neeb*, *supra*, at 557; *Stotts* v. *Memphis Fire Dept.*, 679 F.2d 541, 557 (6th Cir. 1982); *Fox* v. *United States Dept. of Housing*, 680 F.2d 315, 319 (3d Cir. 1982); *Philadelphia Welfare Rights Organization* v. *Shapp*, 602 F.2d 1114, 1119-20 (3d Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980). As such, "[t]he binding substantive commands of a consent decree are embodied within the decree's 'four corners.' " *Stotts* v. *Memphis Fire Dept.*, *supra*, at 557, *citing United States* v. *Armour*, *supra*, at 682. While keeping in mind that consent decrees are judicial orders, courts must nevertheless "confine themselves to the agreement the parties consented to have entered." *Fox* v. *United States Dept. of Housing*, *supra*, at 319. Even under circumstances where the consent decree by its terms declares that the defendant has not admitted to the wrongdoing alleged, "the agreement [nonetheless] embodies a compromise; in exchange for the saving of the cost and the elimination of risk, the parties give up something they might have won." *United States* v. *Armour & Co.*, *supra*, at 263. Both parties relinquish the right to litigate the issue of discrimination. The defendant generally submits to limitation on future conduct or agrees to conform to proscribed conduct and "relinquish [any future] right to rebut the allegation of discrimination." The "[p]laintiff foregoes the right to be made whole" through a court imposed remedy. *Stotts* v. *Memphis Fire Dept. supra*, at 557. Indeed, the consent decree is the product of negotiation and compromise; it reflects the conciliation of dispute and concomitantly imposes obligations upon which both parties have the right to rely.

Here, after extensive litigation, the parties voluntarily agreed that the defendants' certification and recruiting procedures were discriminatory because they had produced an underrepresentation of blacks and hispanics in the police department. Additionally, to ameliorate this discriminatory effect, the parties agreed to a court approved remedy. Now that the victims petition for modification of the consent decree—as a necessary incident to its continued effectiveness—the petitioners seek to reopen the decree and relitigate the issue of liability. In short, the petitioners seek refuge from their contractual obligation which is now part of the consent decree. This we believe this Court should not permit.

Deeply rooted in American jurisprudence is the notion that courts of equity have inherent power to enter supplemental orders to enforce, implement and effectuate their judgments and decrees. *System Federation* v. *Wright*, 364 U.S. 642 (1961). That the power is not without limit is equally obvious. Although the power to modify is lodged within the court of equity as a matter of discretion, it cannot lightly "disregard significant changes in fact or law." *United States* v. *Swift*, 286 U.S. 106, 114-15 (1932). A "balance must thus be struck between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances." *System Federation* v. *Wright*, *supra*, at 647-48. Where "there is such a balance of imponderables there must be wide discretion . . . but discretion is never without limits." *Id.* Two relevant matters have occurred since the original consent decree. One, this Court's interpretation of § 1981 in *Washington* v. *Davis*, *supra*, and *Arlington Heights*, *supra;* and second, the City of Boston's systematic program of reduction in force. These two matters present the major issue of inquiry on modification of the consent decree to effectuate its goal and objectives as against relitigation of issues already resolved by the initial consent decree.

Thus, the issue in this case narrows to the scope or limitation of the court's equity power to modify the consent decree. In

this regard the law is clear. Justice Cardozo, cognizant of the Court's power to modify consent decrees, stated that:

> There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. *The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that exist at its making. We are not at liberty to reverse under the guise of readjusting.*

United States v. *Swift*, *supra*, at 119. (emphasis added).

In *Swift* the defendants sought modification of a consent decree which enjoined the continuance of a combination in restraint of trade and commerce in violation of the Sherman Act. The defendant asserted that changed conditions removed any danger of monopolistic control. Content to leave the defendants where the Court found them, "especially since the place [they were found was] the one they agreed to be," Justice Cardozo reasoned that "[t]hey chose to renounce what they might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall." *United States* v. *Swift*, *supra*, at 117. Here, although the petitioners did not directly seek modification under the principles of *Washington* v. *Davis*, *supra*, they do seek the results in this Court by asserting that the consent decree cannot be properly modified to effectuate its remedial purpose. *Swift* prohibits this result.

The merits of the consent decree are within the rule of *Swift* because a petition to modify cannot alter what the litigants obtained through voluntary consent which merged into the initial consent decree. The petition to modify does not seek to alter what the litigants obtained through compromise. The objective of the petition to modify was to maintain the integrity of the initial consent decree. The purpose of the consent decree was to ameliorate the present and continuing effect of past discrimination; to this, the parties agreed. At this juncture, "[t]he court should not determine the merits of the controversy

or the facts underlying the legal position of the litigants presenting the consent decree." *Stotts* v. *City of Memphis Fire Dept.*, *supra*, at 522. *See also Holiday Inns, Inc.* v. *Strand Development Corp.*, 645 F.2d 239 (4th Cir. 1981) (interpreting Justice Cardozo's admonition as "an immediate reminder that we are not to question the right or wrong of the issuance of the [decree]").

A consent decree should not be modified based on a change in the law underlying the decree by a subsequent judicial decision. While this Court has never spoken definitively on the subject, it should be noted that cases where the courts have modified a consent decree based on changes in law are generally instances where the decree proscribed a form of conduct which the courts had previously held to be illegal, but subsequent to the decree the same conduct was declared—by the legislature or the courts—to be legal. Under these circumstances, the decree no longer served its intended purpose. *See, e.g., Systems Federation* v. *Wright*, *supra*, at 697 ("court cannot disregard significant changes in law or fact if it is satisfied that what it has been doing has turned through changing circumstances into an instrument of wrong"). However, in the instant case, the change in law, has not made racial discrimination legal, but has merely changed the quantum of proof necessary to establish a claim at trial. When the parties voluntarily entered into a court approved consent decree proof of discrimination was dispensed with. Most importantly, however, application of *Washington* v. *Davis*, *supra*, would defeat rather than advance the purposes of the consent decree.

In addition, this Court's rulings in *Washington* v. *Davis*, *supra*, and *Arlington Heights*, *supra*, present no basis for petitioners' assault on the modified consent decree. These cases merely addressed the quantum of proof necessary to establish racial discrimination under 42 U.S.C. § 1981. In the posture of these cases before this Court, proof of racial discrimination is immaterial. To be sure, if a consent decree was entered into prior to trial on the merits the same result would obtain. Such a decree would not constitute an adjudication on

the merits or a finding of racial discrimination. However, the parties would be equally bound by the terms of the decree nonetheless. This is because a consent decree which is the product of delicate and reasoned negotiation and compromise "embodies the legal constraints which govern the behavior of the parties during the life of the decree." *Stotts* v. *City of Memphis Fire Dept.*, *supra*, at 557, *citing United States* v. *ITT Continental Baking Co.*, *supra*, at 236.

Although it is generally recognized that consent decrees are subject to modification, key underlying policy considerations preclude relitigation of issues raised and resolved by an existing decree. *See Brown* v. *Neeb*, *supra*; *Stotts* v. *City of Memphis Fire Dept.*, *supra*. First, relitigation of issues disposed of by a consent decree squanders limited judicial resources. "By such agreements are the burdens of trial spared to the parties, to other litigants waiting their turn before overburdened courts, and citizens whose taxes support the latter. An amicable compromise provides the more speedy and reasonable remedy for the dispute." *Arc Corp.* v. *Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976), *cert. denied*, 429 U.S. 862 (1976). Second, both parties relinquish the right to a judicial declaration of their respective rights and duties in reliance upon the consent decree. Such justifiable reliance should not be lightly disregarded. Finally, "[a]s with all final judgments, the parties have a strong interest in the finality of the decision." *Philadelphia Welfare Rights Org.* v. *Shapp*, *supra*, at 1114, 1119. This is the same consideration that underlies the doctrine of *res judicata*. Clearly, firmness and stability are necessary hallmarks of an effective consent decree.

Coupled with longstanding judicial encouragement of private settlements are practical considerations this Court should not blind itself to. Principles of finality take into consideration the practical reality that necessary party litigants may be absent from the jurisdiction; key witnesses may be unavailable; over extended periods of time witnesses ability to recall crucial facts may be significantly diminished. Balancing these overriding interests in finality neither party should be subjected to the onerous burden of reestablishing what has

been decided and reduced to a decree. *See System Federation* v. *Wright*, *supra*, at 647 (1960). *See generally* Comment, *Request By The Government For Modification of Consent Decrees*, 75 YALE L. REV. 657 (1966). Re-examining the underlying basis of the consent decree is inimical to its very purpose—to bring a certain end to litigation.

The policy considerations underlying a consent decree apply with even greater force in employment discrimination cases. A "consent decree reached after negotiation and consultation is the preferred means of balancing the conflicting societal and individual interests inherent in any employment discrimination action." *Stotts* v. *Memphis Fire Dept.*, *supra*, at 559. Intimations to the contrary would no doubt be "inimical to the policy of encouraging the settlement of Title VII actions." *Id.* at 560. This principle has been repeatedly affirmed. *See, e.g.*, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (cooperation and voluntary compliance were selected by Congress as the preferred means for achieving the goal of unlawful employment discrimination); *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 846 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (conciliation and voluntary settlement are preferred means for resolving employment discrimination suits). When modifying a consent decree a court must attempt to strike a delicate balance to preserve the integrity of its original order. The standard to be applied is "whether the change serve[s] to effectuate or thwart the basic purpose of the original consent decree." *Chrysler Corp.* v. *United States*, 316 U.S. 556, 562 (1942). The purpose and goal of the original consent decree was to achieve racial diversity in Boston's fire and police departments extended over an orderly and reasonable period of time. The City of Boston's proposed layoff threatened to frustrate the time element embodied in the decree as well as eviscerate the progress already realized under the court approved consent decree. Therefore, modification by the district court was necessary to preserve the integrity of the decree. Moreover, as a matter of law, the district court cannot be deemed to have abused its discretion in modifying the decree.

II. THE RACE CONSCIOUS MODIFIED CONSENT DECREE IS A PERMISSIBLE USE OF RACE AS A REMEDY OR AS A GOAL

The modified consent decree ordered by the district court and affirmed by the court of appeals is a proper and permissible race-conscious remedial measure. This Court has previously decided that remedial measures that take race into account are constitutionally permissible. *See, e.g.*, *Regents of University of California* v. *Bakke*, 438 U.S. 265 (1978); *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979); *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980).[5] In addition, this Court has also held that where there is a finding of racial discrimination, race must be considered in the fashioning of a remedy. *North Carolina Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977). Courts are required to tailor the scope of the remedy to fit the nature and extent of the violation. *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1979).

In *Regents of University of California* v. *Bakke, supra*, it was decided that race may be considered in the formulation of a remedy where there had been a previous adjudicative, legislative or administrative finding of racial discrimination. Although this decision invalidated a special program for the admission of minorities, Justice Powell writing for the majority on the issue of race-conscious remedies explicitly stated:

> This case does not call into question congressionally authorized administrative actions *such as consent decrees under Title VII* . . . .

438 U.S. at 302 n.1 (emphasis added).

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[5] *See* Reid, *Assault on Affirmative Action: The Delusion of a Color-Blind America*, 23 How. L.J. 381 (1980); Smith, *Managing in a Multi-Ethnic, Multi-Racial Workforce*, 40 Fed.B. News & J. 163 (1981) for a thorough discussion of the need for race-conscious remedial efforts to correct past discrimination.

Thus, this Court recognized that a consent decree was a valid means for the enforcement of Title VII rights and other voluntary remedial measures.

Amici respectfully submit that *Bakke* and *Weber* are adequate authority for the affirmance of the modified decree. This Court in *Weber* examined the employer's remedial measure and decided that it was a sufficiently tailored remedy to correct the previous discriminatory behavior without causing undue hardship upon non-minority individuals. The content of the original and modified decrees was pursuant to the court's judicial recognition that the City of Boston had discriminated against Black and minority job applicants. *Castro* v. *Beecher*, 334 F. Supp. 930 (D. Mass. 1971), *aff'd*, 459 F.2d 725 (1st Cir. 1972); *Boston Chapter, NAACP, Inc.* v. *Beecher*, 371 F. Supp. 507 (D. Mass. 1974), *aff'd*, 504 F.2d 1017 (1st Cir. 1974). Using the analysis of *Weber* and *Bakke*, the reasonableness of the district court's modified consent decree becomes evident.

A race conscious goal which promotes diversification in public sector employment is legitimate and constitutional. *Regents of the University of California* v. *Bakke*, *supra*. The legal rights of victims of past discrimination must be vindicated. The court below recognized this basic tenet and balanced the hardships of white workers with the hardships of black workers. This was just, reasonable and correct for several reasons.

First, it has been recognized by this Court on numerous occasions that in order to fulfill the constitutional mandate of equality for all people, when enforcing constitutional rights of blacks, the expectations of whites may be impacted upon. For illustrations of this concept, *see Jones* v. *Mayer*, 392 U.S. 409, 445-46 (1968) and cases cited therein. In this case, the white workers had expectation interests in the seniority system. These expectations, besides being obtained during a period of racial exclusion, were not "indefeasible rights." *Humphrey* v. *Moore*, 375 U.S. 335 (1964); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953). On the other hand, the black workers had

legitimate constitutional rights to an effective remedy in a consent decree bottomed on a conclusion of liability. When examining the balancing of the interests of the white workers against the rights of the black and hispanic workers which was achieved by the modified consent decree, it is clear that the decree is just and reasonable. It provides for the maintenance of an 11.7% level of minority public servants in an area with a 30% minority population. A proper compromise, recognizing the needs of all workers, was achieved by weighing the "conflicting societal and individual interests inherent in any employment discrimination action." *Stotts* v. *Memphis Fire Department, supra,* at 560.

A closer look at the consent decree reveals that it does not require the maintenance of minorities equal or approximate to the percentage of minorities in the community; it does not require the retention of unqualifed workers; and it does not require the layoff of all white workers. *See Wygant* v. *Jackson Board of Education,* 546 F. Supp. 1195 (E.D. Mich. 1982). The consent decree does not unnecessarily trammel the interests of white workers. *United Steelworkers* v. *Weber, supra,* at 208. The white workers who are laid off will be in excellent positions for rehiring through reinstatement[6] and the white workers retaining their positions will still dominate the police and fire work forces.

An additional justification for the modified consent decree is that it furthers a legitimate public interest. Even assuming that the white workers had rights in their positions, this Court has recognized in a variety of contexts that individual rights must give way in some circumstances in order to achieve the higher societal goals that are mandated by the Constitution. *See, e.g., Flast* v. *Cohen,* 392 U.S. 83 (1968) (government may spend individual's tax money as it deems necessary); *United States ex rel. Tennessee Valley Authority* v. *Powelson,* 319 U.S. 266 (1943) (eminent domain power used on individual's

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[6] *See supra* at note 4.

property in the public interest); *United States* v. *Ballard*, 322 U.S. 78 (1944) (religious freedom is not absolute); *Prince* v. *Commonwealth of Massachusetts*, 321 U.S. 158 (1944) (religious freedom is not absolute); *United States* v. *Bethlehem*, 315 U.S. 289 (1942) (military draft in the public interest); *Selective Draft Law Cases*, 245 U.S. 366 (1918); *Whitney* v. *California*, 274 U.S. 357 (1927) (free speech not absolute individual right).

At the turn of the century, in *Jacobson* v. *Massachusetts*, 197 U.S. 11, 26 (1905), it was stated:

> This Court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the State. . . .'

The maintenance of domestic tranquility compels public service departments, such as police and fire, to be racially diversified. In 1967, President Lyndon B. Johnson directed the Kerner Commission to define the cause of racial disorder in the United States and to make recommendations to restore and preserve domestic tranquility. O. Kerner, *Report of the National Advisory Commission on Civil Disorders* (1968) [hereinafter cited as *Kerner Report*]. Boston was cited by the Report as a city in which there had been "serious disorders" during that year. *Kerner Report*, *supra*, at 65, 323, 325. Drawing upon a considerable amount of information and material furnished by the Boston Police Department, the Commission placed much reliance upon the data as a basis for its recommendations. *Id.* at 172. A number of factors were considered as having contributed to the cases of the disturbances, paramount among them was the deep hostility between police and ghetto communities. *Id.* at 157, 165. The Commission strongly supported the position requiring racial balance in the police forces. *Id.* at 166.

Racial unrest remains pervasive in the United States as has been evidenced by the recent incidents in Miami, New York and New Orleans. *See, e.g.*, Margolick, *Two Justices Bar Broadcast*, N.Y. Times, Jan. 17, 1983, at A1, col. 5; Rule,

Scars Linger From Assault in Gravesend, N.Y., Times Jan. 17, 1983, at B2, col. 5; Stuart, *Economic Troubles of Miami's Blacks is Major Issue Facing Prospering City*, N.Y. Times, Jan. 16, 1983, at 16, col. 1. It is apparent that the recommendations of the *Kerner Report* remain compelling, particularly in Boston. Banks, *Judge Banks Speaks Out*, Black Enterprise 24 (Dec. 1980); *See also* A. Higginbotham, *In the Matter of Color, Race and the American Legal Process, The Colonial Period* 61 (1978).

In the instant case, all workers must bear certain burdens in order to help the society achieve an integrated public workforce. A diversified public workforce is compelled by the public interest.

III. THE DISTRICT COURT'S MODIFICATION OF THE CONSENT DECREE IS CONSISTENT WITH THE COURT'S EQUITY POWERS UNDER TITLE VII AND ITS INHERENT EQUITY POWERS

Petitioners contend that the district court's modification of the consent decrees entered into in these cases must bow to a conflicting state law providing that layoffs must be accomplished in order of reverse seniority. Mass. Gen. Laws Ann. ch. 31, § 39 (West 1979). *Amici* find this position untenable. As the First Circuit noted in affirming the modification, "[i]t is now settled that remedies to right the wrong of past discrimination may suspend valid state laws." *Boston Chapter, NAACP, Inc.* v. *Beecher, supra*, at 975. State and local laws have been forced to yield to federal equitable remedies in countless race discrimination cases. Federal courts' power to override or otherwise affect the operation of state laws rests on the Supremacy Clause of the United States Constitution. *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Harvest* v. *Board of Public Instruction of Manatee County, Fla.*, 312 F. Supp. 269 (M.D. Fla. 1970).

The Massachusetts statute providing that employees be laid off in order of reverse seniority (with the exception of veterans) is like any other state law: it is inferior to a federal remedy

protecting a constitutional right. *Amici* reject petitioners' contention that the district court, whatever its inherent equitable powers or its powers under Title VII, was specifically barred from according respondents the relief contained in the modification of the consent decrees. Petitioners contend that section 703(h) of Title VII,[7] and cases decided by this Court thereunder,[8] shield "bona fide" seniority systems from interference by courts fashioning equitable remedies in employment discrimination cases. We find petitioners' argument defective on several grounds.

First, in Judge Wisdom's oft-quoted statement, "the equitable powers of the courts exist independently of the Civil Rights Act of 1964." *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd on reh'g. en banc*, 380 F.2d 385, *cert. denied sub nom. Caddo Parish School Board* v. *United States*, 389 U.S. 840 (1967).

The plaintiffs in the original cases did not come before the court asking for relief within the confines of Title VII alone. The police case was not *even* brought under Title VII, but under the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983. Any limits to relief that may exist under Title VII can have no possible application to the police case. The fire case

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[7] Section 703(h) reads in pertinent part:

> Notwithstanding any other provision of this title . . . it shall not be an unlawful employment practice for an employer to apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(h) (1976 & Supp. III 1979).

[8] *E.g.*, *Pullman-Standard* v. *Swint*, ___ U.S. ___, 102 S.Ct. 1781 (1982); *American Tobacco* v. *Patterson*, ___ U.S. ___, 102 S.Ct. 1534 (1982); *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324 (1977); *Franks* v. *Bowman Trans.*, 424 U.S. 747 (1977); *See also* Comment, *Title VII* v. *Seniority: Insuring Rights or Denying Rights?* (to be published in 26 How. L.J. ___ (1983)).

was brought under both Title VII and sections 1981 and 1983, so that even if any relief were deemed to be precluded under Title VII, it would still be available under the older civil rights statutes and under the court's inherent equity powers. This Court itself held that section 1981 provides a remedy against employment discrimination that exists independently of remedies available under Title VII. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975).

Amici's second ground for objecting to petitioners' claim that the relief granted was prohibited is that the cases relied on by petitioners—cases decided by this Court in which seniority rights clashed with affirmative action plans—have all been concerned with private collective agreements. This Court's decisions in those cases evinced a desire to balance the competing rights of minorities to abatement of past and future discrimination against the rights of private parties to enter into binding collective bargaining agreements without undue government intervention.

Here, however, the alleged seniority rights sought to be protected by petitioners spring *from* government. The beginning and end of such rights lie in a Massachusetts statute, which, like all other state statutes, may be superseded by a valid federal court decree implementing constitutional rights.

Furthermore, *Amici* find the cases relied upon by petitioners[9] to be inapplicable here because they, in one way or another, all turn on the question of whether the actual operation of a seniority system, under the facts of a given case, can be deemed to be a remediable act of discrimination. The issue presented here is whether a statute creating seniority rights can be affected as an incident of relief granted after liability for a separate act of discrimination—unfair hiring procedures—

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[9] *See, e.g.*, cases cited *supra*, at note 8.

has been firmly established. We find persuasive the First Circuit's reasoning on this point:

> We find nothing in this trilogy [of Supreme Court cases addressing seniority and race discrimination] that precludes a court from ordering relief to remedy discrimination that exists apart from the adoption or application of a bona fide seniority system. The original consent decrees in the cases before us, decided long before the Supreme Court cases, were directed at such independent violations, the use of discriminatory certification examinations. None of the Supreme Court cases apply to the basic issue at stake here, the power of a court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority-based layoffs.

Boston Chapter, NAACP, Inc., supra, at 974-75.

The consent decree modification was no attack on a statutory seniority provision; it was a move to protect earlier granted relief. The modification could properly have been included in the original decree, had the circumstances that led to its issuance been foreseen; it ought not be denied to respondents now.

Petitioners argue at great length that the "rightful place" rule enunciated by this Court in *Franks* v. *Bowman Transportation Co., supra*, is an impassable barrier to the relief granted. While *Amici* have explained, *supra*, why we believe this case, along with other cases raising the seniority issue in an employment discrimination case, is inapplicable here, the vigor with which petitioners assert the rightful place rule requires that Amici respond to their position with particularity.

The rightful place rule, grounded in the tort law tenet that an injured party must be made whole, and restored to the position he would have occupied but for the injury, provides that identifiable victims of discrimination may be granted the seniority that would have accrued to them but for the discrimination. The rule reaches only identifiable victims.

But in any employment discrimination suit, it is not merely the plaintiffs before the court whose injuries are to be redressed. An employment discrimination suit vindicates the public interest in a bias-free workplace. *Fears* v. *Burris Mfg. Co.*, 48 F.R.D. 91 (N.D. Miss. 1969). Remedies granted in such suits must " 'so far as possible eliminate [not only] the discriminatory effects of the past . . . [but] bar like discrimination in the future.' " *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975) (quoting *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965)). The Court's mandate that remedies should bar future discrimination—the precise form of which can only be guessed at, and the victims of which cannot be enumerated with certainty—directs a tribunal sitting in an employment discrimination case to fashion remedies addressed to systems and policies, as well as to individuals. The rightful place rule is a good rule as far as it goes—but it does not reach all of the interests at stake in discrimination cases.

It is inevitable that in the process of vindicating the public interest, or pursuing a public policy, some non-victims will be aided as individuals; it is no less inevitable that some individual victims of past discrimination will never receive any redress. J. Clay Smith, Jr., formerly acting chairman of the Equal Employment Opportunity Commission, testified at House hearings on the necessity of sometimes aiding individual non-victims of discrimination in order to redress the public's grievance:

> Take a cab company that is regulated by a local public utility commission. The local public utility commission says that you shall not charge but so much per mile. Let's assume the cab company then says, "We are going to violate the law and charge a higher rate."
>
> A member of the public goes to the public utility commission and sues. The commission finds that the cab company, in fact, has charged an excessive amount. The commission then formulates a remedy, and that remedy is that the company has to reduce its charges for the next 50, 60 or 1,000 persons or for a particular period of time.

> Now the victims, the people who paid the excessive amount, are gone. They are all over the country, and can't be identified. So as an equitable principle in order to uphold the law, the courts will allow the equitable relief fashioned by the commission to be imposed even though the people who are benefiting from the lower fees are not the victims who were overcharged.

Oversight Hearings on Equal Employment Opportunity and Affirmative Action Part 1 Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 97th Cong., 1st Sess., 391 (1981) (statement of J. Clay Smith, Jr., former acting chairman of the Equal Employment Opportunity Commission).

In an employment discrimination case, particularly one involving public employees charged with protecting the public safety, the measure of the adequacy of the relief is not whether any one individual is made whole, but have the effects of the illegal conduct been eliminated?

CONCLUSION

For the foregoing reasons, *Amici* submits that the opinion of the court below should be affirmed.

Respectfully submitted,

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